Supreme Court, U.S.
FILED

99 4 JUN 2 3 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. BEGALA,
Petitioner,

v.

PNC BANK, OHIO,
NATIONAL ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY M. CHESLEY
PAUL M. DE MARCO
(Counsel of Record)
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.
1513 FOURTH & VINE TOWER
ONE WEST FOURTH STREET
CINCINNATI, OH 45202
(513) 621-0267

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

52 pp

QUESTION PRESENTED

Do "payment holidays" — *i.e.*, lenders allowing their customers to defer loan payments for one month — constitute extensions of credit under the Truth in Lending Act, which defines "credit" as "the right granted by a creditor to a debtor to defer payment of a debt ...."?

PARTIES TO THE PROCEEDINGS

The petitioner in this action is John A. Begala. The respondent is PNC Bank, Ohio, N.A.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

A. Introduction 2

B. Factual Background 3

C. The District Court's Decision 5

D. The Decisions of the Court of Appeals 7

REASONS WHY THE PETITION SHOULD BE GRANTED 10

A. Introduction 10

B. Under the fundamental provisions of TILA, in particular 15 U.S.C. § 1602(e), the payment holidays offered to Mr. Begala, for which he paid new, substantial consideration, constituted extensions of credit unto themselves, for which TILA disclosures were required. 13

C. Because payment holidays are credit transactions unto themselves under the language of § 1602(e), the Sixth Circuit improperly analyzed them under § 1634, the so-called "subsequent event" exception to TILA 19

CONCLUSION 22

APPENDIX

Appendix A
Sixth Circuit Opinion, 12/28/98 . . . . . 1a

Appendix B
Sixth Circuit Order, 3/26/99 . . . . . 10a

Appendix C
District Court Memorandum and Order, 7/30/97 . . . . . 13a

Appendix D
15 U.S.C. § 1602 . . . . . 22a

Appendix E
15 U.S.C. § 1638 . . . . . 23a

TABLE OF AUTHORITIES

Cases

American Express Co. v. Koerner,
452 U.S. 233, 101 S.Ct. 2281 (1981) 16

Bone v. Hibernia Bank,
493 F.2d 135 (9th Cir. 1974) . . . . . *passim*

Brown v. Marquette Savings & Loan Association,
686 F.2d 608 (7th Cir. 1982) 20

Connecticut National Bank v. Germain,
503 U.S. 249, 112 S.Ct. 1146 (1992) 11, 18

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555, 100 S.Ct. 790 (1980) . . 11, 16, 17

Mourning v. Family Service Publications, Inc.,
441 U.S. 356, 93 S. Ct. 1652 (1973) . . . . . *passim*

Nash v. First Financial Savings & Loan Association,
703 F.2d 233 (7th Cir. 1983) 20

Purtle v. Eldridge Auto Sales, Inc.,
91 F.3d 797 (6th Cir. 1996) 12

Travis v. Boulevard Bank N.A.,
880 F.Supp 1226 (N.D. III. 1995) 20

White v. Arlen Realty & Development Corp.,
540 F.2d 645 (4th Cir. 1975) 16

Statutes and Regulations

15 U.S.C. § 1601 . . . . . 1, 14
15 U.S.C. § 1634 . . . . . 8, 19, 20, 21
15 U.S.C. § 1640 14
16 U.S.C. § 1602 . . . . . *passim*
16 U.S.C. § 1638 . . . . . 1, 11, 15
28 U.S.C. § 1254 1
28 U.S.C. § 1367 6
12 CFR § 226.2 . . . . . *passim*
12 CFR § 226.3 17
12 CFR § 226.4 15
12 CFR § 226.5 15
12 CFR § 226.17 . . . . . 8, 15
12 CFR § 226.18 15

Other Authorities

Comptroller's Handbook: Credit Card Lending, Comptroller of the Currency, October, 1996 . . . . . 17, 18

The Boston Globe, "Consumer Beat," Patricia Wen and Bruce Mohl, February 8, 1998, p. B2 12

Bruens, Craig A. "Melting the Plastic Theories: Advocating the Common Law of Fraud in Credit Card Non-Discargeability Actions Under 11 U.S.C. § 523(a)(2)(A)." Vanderbilt Law Rev., Oct. 1997, Vol. 50, p. 1257 12

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in Case Nos. 97-3915/4147 is reported at 163 F.3d 948 (6th Cir. 1998) and is reproduced at Appendix A, p. 1a. The decision of the Sixth Circuit denying the Petition for Rehearing *En Banc* in Case Nos. 97-3915/4147 is unreported and is reproduced in Appendix B, p. 10a. The decision of the United States District Court for the Southern District of Ohio is unreported and is reproduced in Appendix C, p. 13a.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 28, 1998. Petitioner filed a timely Petition for Rehearing *En Banc* on January 11, 1999. On March 26, 1999, the Sixth Circuit issued a decision denying the Petition for Rehearing *En Banc*, denying a rehearing by the panel, and clarifying its original decision. This Court has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves various provisions of the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*), especially §§ 1602(e) and 1638(a)(3) and (b)(1). These provisions appear in Appendices D and E.

STATEMENT OF THE CASE

A. Introduction

This petition involves the dismissal of a proposed class action brought under the Truth in Lending Act (TILA). The published decision of the United States Court of Appeals for the Sixth Circuit concerns the application of TILA to biannual loan payment deferrals called "payment holidays." Twice each year since the late 1980's, the respondent, PNC Bank, Ohio, N.A. ("PNC"), and its predecessor, Central Trust Company, N.A., induced tens of thousands of the Bank's loan customers to accept these one-month deferrals of their loan payments, usually in exchange for a flat $60.00 extension fee. The Bank induced its customers to accept payment holidays without ever disclosing the enormous finance charges that customers would inevitably incur as a direct result of the payment holidays.

The TILA claim at issue focuses on whether or not payment holidays meet the statute's definition of "credit," since TILA disclosures are required whenever "credit" is extended. The Act defines "credit" as "*the right granted by a creditor to a debtor to defer payment of a debt* . . . ." 15 U.S.C. § 1602(e) (emphasis added); *see also* 12 CFR § 226.2(q). The gist of this TILA claim is that "the right . . . to defer payment of a debt" was precisely the right that PNC granted its loan customers each time it gave them payment holidays and, thus, each biannual payment holiday offer should have included TILA disclosures, particularly the cost of the "credit" being extended.

Despite the express language of § 1602(e), the court of appeals affirmed the dismissal of this action. The Sixth Circuit held that payment holidays do not constitute "credit"

transactions under TILA and that, therefore, PNC was not obligated to disclose the finance charges that customers would incur as a result of the payment holidays.

B. Factual Background

Plaintiff John A. Begala's 60-month car loan with PNC (then Central Trust Company, N.A.) commenced on November 29, 1987. His usual monthly payment was $442.82. Mr. Begala's original loan agreement did not mention that he could ever postpone a monthly payment. Only later was Mr. Begala introduced to the Bank's payment holiday program via PNC's biannual payment holiday letters. A typical payment holiday letter, which Mr. Begala received in May 1993, was addressed "TO OUR VALUED LOAN CUSTOMERS" and read as follows:

> PNC BANK WOULD LIKE TO HELP YOU ACCUMULATE SOME EXTRA CASH DURING THE VACATION SEASON BY GIVING YOU AN OPPORTUNITY TO POSTPONE ONE LOAN PAYMENT.
>
> HERE'S HOW IT WORKS. THE AUTHORIZATION FORM ATTACHED BELOW LISTS A LOAN EXTENSION FEE WHICH IS THE PAYMENT YOU MAKE NOW IN ORDER TO POSTPONE YOUR REGULAR PAYMENT. SIMPLY SIGN THE AUTHORIZATION AND FORWARD IT ALONG WITH YOUR EXTENSION FEE PAYMENT. YOUR LOAN TERM WILL AUTOMATICALLY BE EXTENDED BY THE ONE PAYMENT YOU'RE POSTPONING NOW.

THAT'S ALL THERE IS TO IT. THIS OFFER IS GOOD UNTIL JULY 31, 1993 SO YOU CAN POSTPONE YOUR JUNE OR JULY PAYMENT.

IF YOU'D LIKE TO TAKE ADVANTAGE OF THIS OFFER, HERE'S YOUR CHANCE. RI MEMBER, JUST SIGN AND DETACH THE AUTHORIZATION PROVIDED BELOW AND RETURN IT WITH YOUR EXTENSION PAYMENT IN THE ENCLOSED ENVELOPE. WE MUST RECEIVE YOUR AUTHORIZATION AND EXTENSION PAYMENT PRIOR TO YOUR REGULAR PAYMENT DATE IN THE MONTH DURING WHICH YOU WISH TO POSTPONE A PAYMENT.

IF YOU HAVE ANY QUESTIONS REGARDING THIS OFFER PLEASE CALL 651-TALK.

SINCERELY,
CONSUMER FINANCE DIVISION

(Emphasis added.) The "EXTENSION AUTHORIZATION" that appeared at the bottom of each payment holiday letter read:

THIS IS YOUR AUTHORIZATION TO EXTEND MY INSTALLMENT LOAN # * * * ONE MONTH BEYOND THE PRESENT MATURITY. THE EXTENSION FEE IS * * *.

SIGN HERE AND RETURN WITH YOUR CHECK

Each extension authorization also specified the customer's loan number, the amount of the extension fee due (usually $60.00), and the customer's name and address.

Twice each year, thousands of PNC loan customers executed, clipped, and returned an extension authorization, and sent with it the required check for the specified extension fee. PNC estimates that about one-third of its loan customers have accepted payment holidays via such letters. PNC never mentioned interest or finance charges in these letters.

Mr. Begala responded positively to PNC's payment holiday letters nine times, paying more than $400.00 in extension fees. In May 1993, he contacted PNC to arrange to make the final payment on his loan and to receive clear title to his automobile. PNC informed Mr. Begala for the first time that his final payoff was not, as Mr. Begala expected, the usual $442.82, but rather $442.82 plus approximately $1,000.00. PNC claimed that the additional amount was attributable to finance charges that had been imposed as a result of Mr. Begala's acceptance of PNC's payment holidays.

C. The District Court's Decision

In the Class Action Complaint he filed on January 23, 1997, Mr. Begala alleged that PNC violated its duty under TILA to disclose to each loan customer the additional finance charges that would be assessed due to payment holidays. The complaint proposed a class of all PNC loan customers who had accepted payment holidays offered in letters such as that quoted above.

PNC moved to dismiss Mr. Begala's TILA claim, arguing not that the Bank had accurately disclosed the costs that would result from acceptance of payment holidays, but that TILA did not require it to make any such disclosures. On July 30, 1997, the United States District Court for the Southern District of Ohio entered a judgment dismissing the TILA claim with prejudice under Rule 12(b)(6) and dismissing all other claims without prejudice under 28 U.S.C. § 1367(c).

The district court's decision began by assuming that plaintiff's TILA claim must be based on the failure of PNC to make new TILA disclosures after the consummation of the Bank's original loan transaction with Mr. Begala. Appendix C, p. 16a. The district court went on to analyze whether or not payment holidays constituted refinancings requiring new TILA disclosures, ultimately holding that they did not. *Id.* at 17a-18a.[1] The district court further stated that § 1602(e) and the other TILA provisions cited by plaintiff were merely "definitional" and did not impose a disclosure requirement on PNC, even though the court curiously observed as well that

---

[1] The district court decided this issue even though Mr. Begala had stated the following in his opposition to PNC's motion to dismiss:

> Mr. Begala has never argued that PNC's payment holiday constituted a refinancing of Mr. Begala's loan. Rather, Mr. Begala maintains . . . that the payment holidays granted him "the right . . . to defer payment of a debt," 15 U.S.C. § 1602(e), and that, thus, the payment holidays, by themselves, constituted credit transactions for which accurate disclosures were required.

these provisions "establish ... that Defendant extended credit to Plaintiff ...." *Id.* at 18a-19a.

D. The Decisions of the Court of Appeals

On appeal, Mr. Begala again contended that payment holidays required TILA disclosures because they were new credit transactions under the explicit language of § 1602(e). He also made it clear he was not contending that payment holidays constituted refinancings. *See* n. 1, *ante*. Nevertheless, the Sixth Circuit analyzed Mr. Begala's argument as if he were contending that payment holidays required TILA disclosures because they constituted refinancings. The Sixth Circuit's decision stated:

> Begala attempts to construe the deferrals as refinancings, but the Official Staff Commentary specifically precludes this: "Changes in the terms of an existing obligation, *such as the deferral of individual installments*, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation." Official Staff Commentary to 12 C.F.R. § 226.20(a) at 397. Hence, Begala cannot argue that each deferral authorization resulted in the cancellation of his old obligation and the substitution of a new obligation, because it is the very operation of the old obligation—causing interest to accrue on the postponed payments at the rate of his loan—to which he objects.

Appendix A, pp. 7a-8a (emphasis in original).

Without analyzing Mr. Begala's argument that payment holidays required new TILA disclosures because they were credit transactions under the express language of § 1602(e), the Sixth Circuit concluded that "each payment deferral cannot be construed as a new credit transaction, triggering TILA's disclosure requirements." Appendix A, p. 9a. In reaching this conclusion, the Sixth Circuit relied chiefly on the "subsequent event" exception to TILA (15 U.S.C. § 1634) and on *dicta* from Bone v. Hibernia Bank, 493 F.2d 135, 140-1 (9th Cir. 1974), a twenty-five year old Ninth Circuit decision ostensibly "[i]nterpreting § 1634." Appendix A, p. 8a.[2]

Plaintiff filed a Petition for Rehearing *En Banc*, noting that the original panel had failed to address the express language of TILA, particularly the definition of credit in § 1602(e). No judge having requested a vote on the *en banc* suggestion, the petition was referred to the original panel, which denied rehearing but also issued a decision clarifying

---

[2] In rejecting Mr. Begala's TILA claim, the Sixth Circuit classified payment holidays as "subsequent events" under § 1634, for which no new TILA disclosures were required, rather than as new credit transactions under § 1602(e), for which TILA disclosures would be required. In reaching this conclusion, the Sixth Circuit mistakenly stated that Mr. Begala contended payment holidays are refinancings. Appendix A, p. 7a. Refinancings require disclosures because they are considered exceptions to the "subsequent event" exception. 12 CFR § 226.17(e). But, as noted above, Mr. Begala did not argue — and indeed specifically disclaimed any intent to argue — that payment holidays trigger TILA's disclosure requirements because they meet the definition of refinancings. By misapprehending Mr. Begala's argument in this fashion, the court of appeals repeated the mistake made in the district court opinion discussed above.

its original decision. The second opinion, dated March 26, 1999, stated that,

> although the opinion does not explicitly cite § 1602(e), it does state in the last paragraph of the opinion that "[n]o specific duty to make post-consummation disclosures arises under the statute or the regulations, and each payment deferral cannot be construed as a new credit transaction, triggering TILA's disclosure requirements." Begala v. PNC Bank, 163 F.3d 948, 951 (6th Cir. 1998) (emphasis added). The court's opinion cites the Official Staff Commentary related to refinancings, which provides that "[c]hanges in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation." Id. (citing Official Staff Commentary to 12 C.F.R. § 226.20(a) at 397). Although this provision does not explicitly address the questions of whether a payment deferral constitutes a new credit transaction under § 1602(e), we are of the opinion that it clearly indicates that courts are to interpret "the deferral of individual installments" as "[c]hanges in the terms of an existing obligation," as opposed to a new credit transaction requiring new disclosures.

Appendix B, p. 11a.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. Introduction

Congress passed the Truth in Lending Act after concluding that, even while "the use of consumer credit was expanding at an extremely rapid rate," consumers were "remarkably ignorant of the nature of their credit obligations and the costs of deferring payment." Mourning v. Family Service Publications, Inc., 411 U.S. 356, 363, 93 S. Ct. 1652, 1657-8 (1973). Congress had also found that inadequate disclosure of the costs of credit was causing many consumers "to assume liabilities they could not meet." *Id.* In enacting TILA, Congress was well aware "that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish." *Id.* at 365. Thus, Congress intentionally chose a broad definition of "credit" that would encompass a wide variety of practices by which creditors might allow debtors to defer debt payments.[3]

The Sixth Circuit's decision interpreting TILA disregards and diminishes the rights of the tens of thousands of potential class members, and hundreds of thousands, if not millions, of other Americans who are annually induced to accept payment holidays without proper disclosures of their true costs and consequences. TILA defines a credit transaction as one in which a creditor grants a debtor "*the right ... to*

---

[3] In choosing this definition, Congress discarded an earlier, much narrower version of the "credit" definition. Mourning, 411 U.S. at 386 n.4 (Dissenting opin. by Justice Powell).

defer payment of a debt or to incur debt and defer its payment." §1602(e) (Emphasis added.) Payment holidays fit squarely within this definition. Since payment holidays are credit transactions unto themselves under § 1602(e), the disclosure requirements of TILA are triggered each time a creditor offers a payment holiday to a debtor. 15 U.S.C. § 1638(a)(3) and (b)(1).

The Sixth Circuit's decision essentially reads § 1602(e) out of TILA altogether, rendering its language entirely meaningless. The Sixth Circuit based its construction on *dicta* from a twenty-five year old Ninth Circuit decision, Bone v. Hibernia Bank, 493 F.2d 135, which had also ignored the express language of § 1602(e). The Sixth Circuit thus joined the Ninth Circuit in concluding that it would be "impractical" or "unwieldy" to treat payment holidays as credit transactions requiring TILA disclosures. Such a construction of TILA is incompatible with this Court's decisions, which clearly define a court's obligation when construing statutes. Connecticut National Bank, 503 U.S. 249, 253-4, 112 S. Ct. 1146, 1149 (1992).

This case involves more than just an incorrect construction of TILA; it signals the Sixth Circuit's adoption of an approach to construing TILA that is incompatible with this Court's pronouncements on statutory interpretation and its historical deference to a legislature's choice of words. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 560, 100 S. Ct. 790, 794 (1980) (requiring that a court give effect to the "express language" of TILA). This departure makes certiorari appropriate. Sup. Ct. R. 10(c).

In addition, this case also represents a departure by the Sixth Circuit from its own approach to construing TILA. The Sixth Circuit itself has held that, "'once the [district] court

finds a violation [of TILA], no matter how technical, it has no discretion with respect to the imposition of liability.'" Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 801 (6th Cir. 1996). This departure also makes certiorari appropriate. Sup. Ct. R. 10(a).

Finally, certiorari is appropriate because the Sixth Circuit has decided an important issue of federal law in a way that will have impact far beyond this case. This Court should settle the issue. Sup. Ct. R. 10(c). Lurking beneath the surface of the Sixth Circuit's supposition that it would be "impractical" or "unwieldy" to treat payment holidays as credit transactions is the notion that payment holidays are simply too common in today's world to be considered disclosure-triggering events by themselves. Yet this is precisely the point. The fact that payment holidays have become more common than many other forms of credit that lenders are now extending — more common even than refinancings — and that payment holidays have become an increasingly important profit source for lenders, should be more, not less, justification for applying TILA's express provisions to payment holidays.[4] The fact that the increasing use of payment holidays by consumers is one of the credit practices being associated with increasing defaults by debtors and the rise in personal bankruptcies[5] shows why payment

---

[4] *See* The Boston Globe, "Consumer Beat," Patricia Wen and Bruce Mohl, February 8, 1998, p. B2 (lenders increasingly using payment holidays to increase revenue).

[5] *See* Bruens, Craig A. "Melting the Plastic Theories: Advocating the Common Law of Fraud in Credit Card Non-Dischargeability Actions Under 11 U.S.C. § 523(a)(2)(A)." Vanderbilt Law Rev., Oct. 1997, Vol. 50, p. 1257, 1270 ("Of

holidays fit so well within the original justification for TILA: Congress enacted TILA, in part, because the uninformed use of "credit" was causing consumers "to assume liabilities they could not meet." Mourning v. Family Service Publications, Inc., 411 U.S. at 363. To lose sight of the fact that payment holidays fit within the original justification for TILA, especially when payment holidays also fit within the express language of TILA, is simply to rewrite TILA.

At a time when payment holidays have become increasingly popular and profitable for lenders, the Sixth Circuit's decision invites open- and closed-end creditors to use them without disclosing their consequences to consumers. The decision also invites creditors who, up to now, had disclosed the consequences of accepting payment holidays to offer them to consumers in the future without making any such disclosures.

B. Under the fundamental provisions of TILA, in particular 15 U.S.C. § 1602(e), the payment holidays offered to Mr. Begala, for which he paid new, substantial consideration, constituted extensions of credit unto themselves, for which TILA disclosures were required.

Under 15 U.S.C. § 1640(a), "any creditor who fails to comply with any requirement imposed under [TILA]... with

---

course, simply making credit available does not cause bankruptcy or fraud. Card-issuers, however, engage in deceptive practices that may affect a debtor's ability to pay for credit without affecting his intent to pay.... [One] deceptive tactic is the 'payment holiday' that encourages debtors to skip a month's payment while heavy finance charges continue to accrue.").

respect to any person is liable to such person" for actual damages and statutory penalties.[6] The salient requirements imposed by TILA begin at § 1601, which expresses Congress' intention "to protect the consumer against inaccurate and unfair credit billing and credit card practices" and to ensure "the informed use of credit." The very next section in the Act, § 1602, sets forth the definitions of terms used throughout TILA. As noted throughout this Petition, the term "credit" means "*the right granted by a creditor to a debtor to defer payment of a debt* or to incur debt and defer its payment." § 1602(e) (emphasis added). A consumer credit transaction is "one in which the party to whom *credit* is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." § 1602(h) (emphasis added).

Under the definitions set forth in § 1602, there is no question that the original car loan between the Bank and Mr. Begala constituted an extension of "credit" within the meaning of TILA. But, significantly, the original car loan was not the only extension of credit by PNC to Mr. Begala that was covered by TILA. Because the payment holidays accepted by Mr. Begala specifically conveyed to him "the right ... to defer payment of a debt," each such payment holiday also constituted an extension of credit under § 1602(e) and (h). Since a payment holiday is, by nature, a transaction in which a creditor (*i.e.*, PNC) grants to a debtor (*i.e.* Mr. Begala) "the right ... to defer payment of a debt" (*i.e.*, a monthly

---

[6] Unless otherwise indicated, all references to statutory sections are to provisions of Title 15 of the United States Code.

payment), a payment holiday, standing alone, constitutes an extension of credit under TILA.[7]

This fact is significant because it triggers the disclosure requirements under TILA. TILA requires disclosure of finance charges each time a creditor extends "credit" to a consumer. § 1638(a)(3) and (b)(1); *see also* 12 CFR §§ 226.4, 226.5, 226.18.[8] Finance charges are "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." § 1605(a). Finance charges include interest. *Id.*

It is not only faithful to the express language of TILA, but also makes good sense, to classify payment holidays as extensions of "credit" under TILA and to require that finance charges be disclosed when payment holidays are offered. For example, if, instead of securing a payment holiday one Christmas, Mr. Begala borrowed $442.82 from, say, XYZ Bank and used it to cover his December car payment to PNC, no one would doubt that XYZ Bank had extended "credit" to Mr. Begala and that TILA would entitle him to know the cost

---

[7] PNC has never disputed that Mr. Begala and the other putative class members are natural persons, that they accepted payment holidays "primarily for personal, family, or household purposes," or that PNC is a "creditor" under TILA. § 1602(f) and (h).

[8] TILA requires that such disclosures be made "before the credit is extended," that the requisite information be "disclosed clearly and conspicuously," and that the disclosures "be conspicuously segregated from all other terms, data, or information provided in connection with a transaction...." §§ 1632(a) and (b), and 1638(a)(3); *see also* 12 CFR § 226.17(a).

of the "credit," *i.e.*, the interest XYZ Bank would charge. The fact that Mr. Begala did not have to go to XYZ Bank to achieve the same result and that he only needed a payment holiday from PNC should make a payment holiday no less a disclosure-triggering extension of "credit" under TILA than the money hypothetically borrowed from XYZ Bank would have been.

In Ford Motor Credit Co. v. Milhollin, 444 U.S. at 560, 100 S. Ct. at 794, this Court stated that, "[a]t the threshold,.. interpretation of TILA and Regulation Z demands an examination of their express language ...." Only when there is "an apparent lacuna in the express provisions of TILA and Regulation Z" is a court interpreting TILA permitted to consider the implicit characteristics of the statutory scheme. *Id.* at 560, 570. In this case, the Sixth Circuit, like the Ninth Circuit in Bone, looked past the express language of TILA and based its decision on whether or not plaintiff's proffered interpretation would lead to "impractical" or "unwieldy" results. In neither its original decision nor its clarifying decision did the Sixth Circuit address why a payment holiday does not fit within the express language of § 1602(e). By neglecting to do so, the Sixth Circuit failed to recognize the significance of this statutory definition of "credit" and the other provisions plaintiff cited. Courts, including this Court, have consistently held that TILA's disclosure requirements are triggered by the very same statutory definition of "credit" being cited here. *See, e.g.*, American Express Co. v. Koerner, 452 U.S. 233, 241, 101 S. Ct. 2281, 2286 (1981); Mourning v. Family Publications Service, Inc., 411 U.S. at 362 n. 16 (*see also id.* at 378 [dissenting opin. by Justice Douglas] and at 385 [dissenting opin. by Justice Powell]); White v. Arlen Realty & Development Corp., 540 F.2d 645, 650 n. 12 (4th Cir. 1975). A court cannot simply ignore such a statutory definition, for to do so is to rewrite TILA.

Unlike the situation in Ford Motor Co., the instant situation does not involve any "apparent lacuna in the express provisions of TILA and Regulation Z ...." *Id.* at 570. As long as TILA has existed, the term "credit" has been defined to include "the right granted by a creditor to a debtor to defer payment of a debt ...." Congress has had thirty years to amend this definition to exclude payment holidays, but has never done so.

As long as Regulation Z has existed, it has defined "credit" as "the right to defer payment of debt ...." 12 CFR § 226.2. The Federal Reserve Board, which promulgated and has periodically revised Regulation Z, has never changed the definition of "credit" so as to exclude payment holidays. Nor has the Federal Reserve Board ever given any other indication that it interprets TILA as excluding payment holidays from the definition of "credit" transactions. Section 226.3 of Regulation Z (12 CFR § 226.3) contains a list of "Exempt Transactions" to which Regulation Z "does not apply." Payment holidays have never appeared on this list. In its Official Staff Commentary on Regulation Z, under the heading "Credit" and the subheading "Exclusions," the Federal Reserve Board lists the "situations" that "are not considered credit for purposes of the regulation [*i.e.*, Regulation Z]." *See* ¶ 1 of the Official Staff Commentary to 12 CFR § 226.2(a)(14). Payment holidays have never appeared on this list either.

Moreover, even the Comptroller of the Currency, administrator of national banks such as PNC, has recognized in an official publication that loan customers accept payment holidays for the same reason they secure other forms of credit — to defer debt. In the Comptroller's words, loan customers "use these grace periods to defer their debt repayment." *Comptroller's Handbook: Credit Card Lending*, October

1996, p. 33.

Despite these salient facts — that payment holidays fit squarely within the express language Congress used to define "credit," that the Federal Reserve Board has never given any indication that it regarded payment holidays as exempt from TILA, and that the Comptroller of the Currency has recognized that the essential purpose of payment holidays (*i.e.*, debt deferment) is the same as for other forms of credit covered by TILA — the Sixth Circuit concluded it would simply be too "impractical" or "unwieldy" to treat payment holidays as disclosure-triggering events. Thus, the court of appeals chose to assume Congress could not have meant its words to be taken literally. Yet, it is a cardinal rule of statutory construction that a court "must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut National Bank v. Germain, 503 U.S. at 253-4, 112 S.Ct. at 1149. As this Court stated when interpreting TILA in Mourning v. Family Publications Service, Inc., 411 U.S. at 378, "It is not the function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner." If PNC wishes to contest that its payment holidays constitute extensions of credit under the express language of TILA, the place to do so is not in the courts, which cannot rewrite laws such as TILA, but in Congress, which can. Until Congress alters the statutory definition, the provisions of TILA that are discussed above should be enforced as written. Connecticut National Bank v. Germain, 503 U.S. at 253-4. These provisions required PNC to make TILA disclosures when it offered payment holidays to its customers.

C. Because payment holidays are credit transactions unto themselves under the language of § 1602(e), the Sixth Circuit improperly analyzed them under § 1634, the so-called "subsequent event" exception to TILA.

The Sixth Circuit analyzed payment holidays under the "subsequent event" exception to TILA, rather than engaging in a textual analysis of § 1602(e). The "subsequent event" exception to TILA's disclosure requirements is codified in § 1634 and reads as follows:

> Effect of subsequent occurrence. If information disclosed in accordance with this part is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this part.

In classifying payment holidays as "subsequent events" under § 1634, the Sixth Circuit evidently reasoned as follows: because a payment holiday occurs after a loan agreement has already been executed and because it is a transaction between the very same parties, it must be classified as a "subsequent event" under § 1634 (and 12 CFR § 226.17(e)); and, as a subsequent event, a payment holiday could require new TILA disclosures only if it met the definition of a refinancing. Appendix A, p. 7a, citing 12 CFR § 226.17(e). This reasoning misapprehends the relevant provisions of TILA.

The fact that parties enter into a second credit transaction *after* their original one does not necessarily make the later transaction a "subsequent event" under § 1634; nor

does it automatically foreclose a finding under § 1602(e) that the later transaction constitutes a new credit transaction for which TILA disclosures are required. Indeed, the case law demonstrates that TILA disclosures are required when new credit is extended by a lender to a customer, even though credit had previously been extended by the same lender to the same customer. Brown v. Marquette Savings & Loan Association, 686 F.2d 608, 611-4 (7th Cir. 1982); Nash v. First Financial Savings & Loan Association, 703 F.2d 233, 237-9 (7th Cir. 1983); Travis v. Boulevard Bank N.A., 880 F.Supp 1226, 1230 (N.D. Ill. 1995).

Had the court of appeals properly classified payment holidays as new credit transactions under § 1602(e), there would have been no reason for the Sixth Circuit to analyze payment holidays under § 1634 because, on its face, the "subsequent event" exception to TILA cannot be applied to new "credit" transactions. The two provisions, §§ 1602(e) and 1634, are mutually exclusive. In short, a payment holiday does not fit within the "subsequent event" exception to TILA because a payment holiday is itself a "credit" transaction under § 1602(e). In other words, a payment holiday is a disclosure-triggering event unto itself.

As support for classifying payment holidays as "subsequent events" under § 1634 rather than new credit transactions, the Sixth Circuit adopted the "analysis" of Bone v. Hibernia Bank, 493 F.2d at 140-1, in which the Ninth Circuit said twenty-five years ago that it would be "entirely unwieldy and impractical" to regard payment holidays as anything but "subsequent events" not deserving of TILA disclosures. Appendix A, p. 8a. This remark from Bone is far from a reliable basis for holding twenty-five years later that payment holidays do not constitute "credit" transactions under TILA. Like the Sixth Circuit's decision, Bone failed to

analyze § 1602(e). Actually, Bone was not "[i]nterpreting § 1634" either, as the Sixth Circuit's decision suggests. Appendix A, p. 8a. The Bone court made it clear, "Our concern here is not with the construction of a statute...." Bone, 493 F.2d at 139.

Also, that court was not "asked to consider the question of payment holidays programs," as the Sixth Circuit's decision suggests. Appendix A, p. 8a. Bone had nothing to do with payment holidays; it was a "Rule of 78's" case. Thus, the quoted remark from Bone constituted mere *dicta*, at best an off-handed observation based not on any textual analysis of § 1602(e), but on the now-outdated belief that TILA should be construed so as to avoid what courts deem "unwieldy and impractical" results. This Court has never shrunk from construing TILA as written, based upon a fear of "unwieldy and impractical" results. Again, "[i]t is not the function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner." Mourning v. Family Publications Service, Inc., 411 U.S. at 378.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition be granted.

Respectfully submitted,

/s/_____

Paul M. De Marco
Counsel for Petitioner
Waite, Schneider, Bayless
& Chesley Co., L.P.A.
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 621-0267

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 28, 1998]

Nos. 97-3915/4147

JOHN A. BEGALA,

Plaintiff-Appellant,

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 97-00074—Sandra S. Beckwith, District Judge.

Argued: September 18, 1998
Decided and Filed: December 28, 1998

Before: KRUPANSKY, BOGGS, and DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: Paul M. De Marco, WAITE, SCHNEIDER, BAYLESS & CHESLEY COMPANY, L.P.A., Cincinnati, Ohio, for Appellant. Glenn V. Whitaker, VORYS, SATER, SEYMOUR & PEASE, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Paul M. De Marco, WAITE, SCHNEIDER, BAYLESS & CHESLEY COMPANY, L.P.A., Cincinnati, Ohio, for Appellant. Glenn V. Whitaker, Phillip J. Smith, VORYS, SATER, SEYMOUR & PEASE, Cincinnati, Ohio, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The plaintiff, John Begala, appeals from the dismissal of his action under the Truth in Lending Act and the denial of his post-judgment motion to reopen the action in order to file an amended class action complaint. The district court found that the defendant, PNC Bank, was not required under the Act to make new disclosures when it offered Begala loan payment deferrals, known as "payment holidays," and therefore that Begala had failed to state claim upon which relief might be granted. The court also struck his Rule 60(b) motion for lack of jurisdiction. We conclude that the district court correctly determined that liability cannot be established under TILA, and we find no abuse of discretion in striking Begala's Rule 60(b) motion. We therefore affirm the decision of the district court.

PROCEDURAL AND FACTUAL BACKGROUND

In November 1987, John Begala entered into a 60-month car loan with PNC's predecessor-in-interest. His

monthly payment was $442.82. The original loan agreement did not mention the possibility of deferring monthly payments. Between May 1988 and May 1993, Begala received nine unsolicited letters from PNC offering one month extensions, or deferrals, of his loan, called "payment holidays." One such letter read:

> PNC Bank would like to help you accumulate some extra cash during the vacation season by giving you an opportunity to postpone one loan payment.
>
> Here's how it works. The authorization form attached below lists a loan extension fee which is the payment you make now in order to postpone your regular payment. Simply sign the authorization and forward it along with your extension fee payment. Your loan term will automatically be extended by the one payment you're postponing now.
>
> That's all there is to it. This offer is good until July 31, 1993, so you can postpone your June or July payment.
>
> If you'd like to take advantage of this offer, here's your chance. Remember, just sign and detach the authorization provided below and return it with your extension payment in the enclosed envelope. We must receive your authorization and extension payment prior to your regular payment date in the month during which you wish to postpone a payment.

The extension authorization form at the bottom of the letter states, "This is your authorization to extend my installment loan #[] one month beyond the present maturity. The extension fee is []."

Begala responded all nine times to the payment holiday offers. The extension fees ranged up to $60 per extension, and over the course of the nine extensions, he paid more than $400 in extension fees. When, in May 1993, Begala attempted to make the final payment on his loan, he discovered that he owed not just a final payment of $442.82, but also approximately $1,000 in interest that had accumulated as a result of the nine deferrals.

More than three years later, Begala filed a class action complaint against PNC, alleging that the bank had violated its duty under the Truth in Lending Act to disclose the fact that additional finance charges would be assessed due to the payment holidays, as well as the amount of such charges. PNC moved to dismiss the action, contending that it had no duty under TILA to make disclosures regarding the payment holiday program and, therefore, that Begala had failed to state a claim upon which relief could be granted. Acting on the defendant's motion, the court dismissed the entire action, finding that because TILA does not create a duty of disclosure when creditors offer payment holidays, Begala had failed to state a claim upon which relief could be granted. The court dismissed without prejudice a state law claim of usury and also denied the motion for class certification.

On appeal, Begala raises several arguments, but only one is dispositive of the case: whether the statute and

regulations implementing TILA create a duty to disclose accurately the interest incurred in payment holidays.

DISCUSSION

Standard of Review

Because a motion under Rule 12(b)(6) tests whether a claim has been adequately stated in the complaint, dismissal under Rule 12(b)(6) is proper when, even taking all of plaintiff's alleged facts to be true, he can prove no set of facts that would entitle him to relief. *See American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352, 355 (6th Cir. 1990). We review a district court's grant of a 12(b)(6) motion *de novo*. *See Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir. 1990). In considering the motion, we accept as true all factual allegations in the complaint. *See Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987) (en banc). Moreover, in TILA actions, we defer to the regulations interpreting the Act. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). "Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . ." *Id.*

Analysis

The Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, was enacted to promote the informed use of credit by consumers by requiring meaningful disclosure of credit terms. *See Jones v. The TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (6th Cir. 1984); 15 U.S.C. § 1601. We have repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer. *See Jones*, 747 F.2d at 1040; *Flesher v.*

Household Finance Corp., 640 F.2d 861,863 (6th Cir. 1981) (per curiam). Indeed, TILA was designed to create a "system of private attorney generals [sic] to aid its enforcement," *Jones*, 747 F.2d at 1040, and strict compliance with the disclosure requirement is necessary. *See Purtle v. Eldridge Auto Sales*, 91 F.2d 797, 801 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 2411 (1997).

Neither party disputes that, under TILA, a creditor's principal disclosure obligations arise *before* the credit transaction is consummated. *See Rudisell v. Fifth Third Bank*, 622 F.2d 243, 246 (6th Cir. 1980); 12 C.F.R. § 226.17(b)("The creditor shall make disclosures before consummation of the transaction."). In closed-end transactions such as Begala's car loan, the required disclosures under TILA are to be made as of the time that credit is extended, 15 U.S.C. § 1638(b), and it is as of that time that the adequacy and accuracy of the disclosures are measured. *See Bartholomew v. Northampton Nat'l Bank*, 584 F.2d 1288, 1296 (3rd Cir. 1978). Thus, it is clear that any liability on the part of PNC for failure to disclosure the true costs of the payment holiday plan cannot arise from TILA's pre-consummation requirements; indeed, Begala does not claim that the pre-consummation disclosures he received were inaccurate or misleading.

Therefore, the question before us is whether the statute and its implementing regulations create any *post*-consummation duty of disclosure in payment holiday situations. Generally, subsequent events, including agreements such as in this case, do not affect the validity of initial disclosures or require the creditor to make further disclosures:

> Effect of subsequent occurrence. If information disclosed in accordance with this part is subsequently rendered inaccurate as the result of any act, occurrence, or *agreement* subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this part.

15 U.S.C. § 1634 (emphasis added). The regulations further clarify the narrow circumstances under which subsequent disclosures are required, as follows:

> (e) Effect of subsequent events. If a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of this regulation, although new disclosures may be required under paragraph (f) of this section, § 226.19, or § 226.20.

12 C.F.R. § 226.17(e). The exceptions referred to concern certain residential mortgage and variable rate transactions, 12 C.F.R. § 226.19, refinancings, assumptions, and variable rate adjustments, 12 C.F.R. § 226.20, and circumstances where early disclosures are rendered inaccurate prior to the date of consummation, 12 C.F.R. § 226.17(f), and are inapplicable to the case at hand. Begala attempts to construe the deferrals as refinancings, but the Official Staff Commentary specifically precludes this: "Changes in the terms of an existing obligation, *such as the deferral of individual installments*, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the

substitution of a new obligation." Official Staff Commentary to 12 C.F.R. § 226.20(a) at 397. Hence, Begala cannot argue that each deferral authorization resulted in the cancellation of his old obligation and the substitution of a new obligation, because it is the very operation of the old obligation — causing interest to accrue on the postponed payments at the rate of his loan — to which he objects.

There is little case law interpreting the "subsequent occurrence" provision, but at least one circuit court has been asked to consider the question of payment holiday programs. Interpreting § 1634, the Ninth Circuit assumed that disclosures are not required for loan deferrals:

> [O]nce disclosed, if the annual percentage rate is "rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures . . ." it is not a violation of the Act. 15 U.S.C. § 1634 (1970). *Otherwise, subsequent events such as late payment charges, Christmas deferrals or prepayment of the obligation, would each require a recomputation of the annual percentage rate. This result would be entirely unwieldy and impractical.*

Bone v. Hibernia Bank, 493 F.2d 135, 140-41 (9th Cir. 1974) (emphasis added).

We agree with the analysis in *Bone*. TILA's disclosure requirements arise *before* a credit transaction is consummated, and Begala does not challenge the initial disclosures he received. No specific duty to make post-

consummation disclosures arises under the statute or the regulations, and each payment deferral cannot be construed as a new credit transaction, triggering TILA's disclosure requirements[1]. The district court opinion properly found that "[l]iability under the Truth-in-Lending Act may not be established on the basis of Defendant's failure to make new disclosures when it offered a payment holiday option to plaintiff."

CONCLUSION

For the reasons set out above, we **AFFIRM** the district court's order of dismissal for failure to state a claim. Moreover, we find no abuse of discretion in the district court's decision to strike the plaintiff's Rule 60(b) motion, which was filed after the notice of appeal. Although a district court may indicate its inclination to grant such a motion, there is no requirement that the court do so.

---

[1] The situation presented to us today is easily distinguished from the activity discussed in *Travis v. Boulevard Bank, N.A.*, 880 F.Supp. 1226 (N.D. Ill. 1995). In that case, the bank, without proper authorization, procured insurance against Travis's default and then charged Travis for the premium payments. Faced with a scenario in which the principal amount of a consumer's indebtedness was unilaterally increased by the lender, the district court correctly concluded that the insurance purchase "and the subsequent addition of the resulting premiums to Plaintiffs' existing indebtedness constituted a new credit transaction. Defendant's action involved augmenting Plaintiffs' existing finance charge with an additional finance charge for the resulting premiums. This transaction required new disclosures under TILA." *Id.* at 1229-30.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 26, 1999]

Nos. 97-3915/4147

JOHN A. BEGALA,

Plaintiff-Appellant,

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,

Defendant-Appellee.

ORDER

BEFORE: KRUPANSKY, BOGGS, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied with the following clarification.

Upon review of the appellant's petition to rehear, we conclude that a rehearing is unnecessary. The appellant contends that the court mischaracterized his argument, which was not that disclosures were required because the payment holidays were refinancings, but because they constituted new credit transactions under 15 U.S.C. § 1602(e). To clarify our earlier opinion, we note that although the opinion does not explicitly cite § 1602(e), it does state in the last paragraph of the opinion that "[n]o specific duty to make post-consummation disclosures arises under the statute or the regulations, and *each payment deferral cannot be construed as a new credit transaction, triggerfng TILA's disclosure requirements."* Begala v. PNC Bank, 163 F.3d 948, 951 (6th Cir. 1998) (emphasis added). The court's opinion cites the Official Staff Commentary related to refinancings, which provides that "[c]hanges in the terms of an existing obligation, *such as the deferral of individual installments,* will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation." Id. (citing Official Staff Commentary to 12 C.F.R. § 226.20(a) at 397). Although this provision does not explicitly address the question of whether a payment deferral constitutes a new credit transaction under § 1602(e), we are of the opinion that it clearly indicates that courts are to interpret "the deferral of individual installments" as "[c]hanges in the terms of an existing obligation," as opposed to a new credit transaction requiring new disclosures.

Accordingly, we adhere to our original disposition of this case.

ENTERED BY ORDER OF THE COURT

/s/_____
LEONARD GREEN, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed July 30, 1997]

Case No. C-1-97-74

JOHN A. BEGALA,

Plaintiff,

v.

PNC BANK, OHIO, NATIONAL ASSOCIATION,

Defendant.

MEMORANDUM and ORDER

Plaintiff initiated this action on January 23, 1997 by filing a complaint, styled a "Class Action Complaint," pursuant to which Plaintiff asserts a claim under the Truth-in-Lending Act, 15 U.S.C. §1601, et seq., as well as various state law claims. Before Plaintiff had moved for certification of a class, Defendant filed a motion (Doc. 3) to dismiss this action, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, for failure to state a claim under federal law

upon which relief may be granted. That motion is now before the Court.

1. Background

On November 29, 1987, Plaintiff entered into a sixty-month, fixed rate automobile loan with Central Trust Company, Defendant's predecessor in interest. The attendant Installment Loan Agreement fixed the interest rate at 11.49 percent and disclosed a finance charge of $6,429.38. The Agreement did not mention a feature pursuant to which Plaintiff could periodically postpone a monthly payment, commonly known as a "payment holiday."

On nine occasions between May 1988 and May 1993, Defendant sent to Plaintiff a letter offering a payment holiday and representing that, if Plaintiff exercised the payment holiday option, Plaintiff would be required to pay an extension fee and the term of the loan would be extended by one month. Plaintiff exercised the payment holiday option on each of those nine occasions.

Plaintiff contends that Defendant violated the disclosure requirements of the Truth-in-Lending Act each time it offered Plaintiff a payment holiday by failing to disclose that the finance charge attendant to the loan would increase in the event that Plaintiff exercised the option. Plaintiff also asserts eight causes of action under Ohio law based upon the same facts. Defendant moves for the dismissal of Plaintiff's Truth-in-Lending Act claim, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, and asks the Court to decline to exercise jurisdiction over the subject matter of Plaintiff's state law claims.

2. The Rule 12(b) (6) Standard

A motion to dismiss pursuant to Rule 12(b) (6) operates to test the sufficiency of the complaint. In its consideration of a motion to dismiss under Rule 12(b) (6), the Court is required to construe the complaint in the light most favorable to the Plaintiff and accept all well-pleaded factual allegations in the complaint as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) and Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). The Court will not, however, accept conclusions of law or unwarranted inferences that are presented as factual allegations. Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971). The Court will make all reasonable inferences that might be drawn from the complaint. Fitzke v. Shappell, 468 F.2d 1072, 1076-77 n.6 (6th Cir. 1972). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957).

C. Analysis

The obligation to make the disclosures required by the Truth-in-Lending Act arises before the credit transaction is consummated. See Rudisell v. Fifth Third Bank, 622 F.2d 243, 246 (6th Cir. 1980); 12 C.F.R. §226.17(b). In a closed-end credit transaction, such as the transaction in question[1], an obligation to make new disclosures after the consummation of the transaction arises only in three situations. See 12 C.F.R.

---

[1] See 12 C.F.R. §226.2(10) and (20).

§226.17(e).[2]

Plaintiff has alleged, and the Court must accept as true for the purpose of resolving the instant motion, that the finance charge term disclosure became inaccurate, post-consummation, as a result of Plaintiff's exercise of his payment holiday options. The applicable regulation, 12 C.F.R. §226.17(e), provides, however, that the inaccuracy thus created does not constitute a violation of law. Accordingly, Plaintiff's claim, if any, must be based, not upon the inaccuracy of the old disclosure, but upon a failure by Defendant to make new disclosures. New disclosures are required only as provided in 12 C.F.R. §226.17(f), §226.19, or §226.20.

None of those sections of the regulation required Defendant to make new disclosures when offering a payment holiday to Plaintiff. Paragraph (f) of §226.17 applies when disclosures become inaccurate before consummation.[3] Section

---

[2] 12 C.F.R. §226.17(e) provides as follows:

> Effect of subsequent events. If a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of this regulation, although new disclosures may be required under paragraph (f) of this section, §226.19, or §226.20.

[3] 12 C.F.R. §226.17(f) provides, in pertinent part, as follows:

226.19 applies only to certain residential mortgage and variable-rate transactions, neither of which describes the transaction consummated by Plaintiff and Defendant's predecessor.

Section 226.20 applies to refinancings, assumptions, and variable-rate adjustments. Plaintiff does not contend that the transaction in question was an assumption or a variable-rate adjustment. The Court concludes that the transaction was also not a refinancing, which is defined by the regulation as the satisfaction of an existing obligation and its replacement by a new obligation. 12 C.F.R. §226.20(a). Plaintiff does not allege that his original obligation to Defendant was satisfied each time he exercised the payment holiday option. Rather, Plaintiff elected to extend the repayment period of the existing obligation without satisfying it. Accordingly, the exercise of a payment holiday option did not constitute a refinancing and did not trigger a disclosure requirement pursuant to 12 C.F.R. §226.17(e).

The Court's analysis to this point is consistent with the Official Staff Commentary to 12 C.F.R. §226.20(a). The Commentary suggests that a change in the terms of an existing obligation, "such as deferral of individual installments," does not constitute a refinancing unless it is "accomplished by the cancellation of that obligation and the substitution of a new

---

> Early disclosures. If disclosures required by this subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose [the following] before consummation ....

obligation."

The United States Supreme Court has concluded that the regulations adopted pursuant to the Truth-in-Lending Act and the Official Staff Commentary to those regulations are entitlēd to particular deference. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-66 (1980). In this instance deference is appropriate in light of the rationality of the regulations and commentary in light of the Act's primary applicability to events prior to consummation of a credit transaction. See Rudisell, e.g. 622 F.2d at 246 (the purpose of the disclosure requirements is to permit the borrower to perform comparative shopping for credit terms before consummation of a transaction).

Having concluded that Defendant was not obligated by virtue of the applicable regulations to make new disclosures each time it offered Plaintiff a payment holiday, the Court must consider Plaintiff's argument that an obligation to make new disclosures arose under the provisions of the Truth-in-Lending Act itself, notwithstanding the regulations. Plaintiff contends that 15 U.S.C. §1602(d), (e), (f), and (h), together with 15 U.S.C. §1638(a) (3) and (b) (1), imposed upon Defendant an obligation to make new disclosures each time it offered him a payment holiday option. The Court is not persuaded.

The cited subsections of 15 U.S.C. §1602 are definitional. In the context of Plaintiff's claim, they establish only that Plaintiff and Defendant are persons, that Defendant extended credit to Plaintiff, that Defendant is a creditor, and that Plaintiff is a consumer. Subsection (a) (3) of 15 U.S.C. §1638 establishes, in the context of Plaintiff's claim, that

Defendant was obligated to disclose the finance charge in connection with the transaction. The final statutory provision cited by Plaintiff is 15 U.S.C. §1638(b) (1), which provides, in pertinent part, that "the disclosures required . . . shall be made before the credit is extended." The Court does not perceive in that language a basis for a claim based upon Defendant's failures to make new disclosures when it offered the payment holiday options to Plaintiff.

Plaintiff also refers to various regulations, in addition to those cited above, for the proposition that Defendant was required to make new disclosures. Those provisions, however, do nothing more than establish the nature of the disclosures to be made, when disclosures are required, and provide a specific definition of the term, "finance charge," as used in the regulations. See 12 C.F.R. §§226.4 and 226.18. None of the regulations cited by Plaintiff suggests that Defendant was obligated to make new disclosures when it offered a payment holiday option to Plaintiff.

The Court concludes, on the basis of the foregoing analysis of the statutes in question and the applicable regulations, that Defendant was obligated to make disclosures only prior to the consummation of the original transaction in question. Liability under the Truth-in-Lending Act may not be established on the basis of Defendant's failure to make new disclosures when it offered a payment holiday option to Plaintiff. Plaintiff has not, therefore, stated a claim for relief under the Truth-in-Lending Act upon which relief may be granted.

Having concluded that Plaintiff's sole cause of action under federal law is subject to dismissal, the Court declines to

retain jurisdiction over Plaintiff's remaining claims. Accordingly, those claims are dismissed without prejudice to their reassertion in a court of competent jurisdiction.

Plaintiff contends that this action may not be dismissed, even should the Court conclude, as it has, that Plaintiff has not stated a claim under federal law upon which relief may be granted. The basis of Plaintiff's assertion is that the complaint in this action contains class allegations, which are not subject to dismissal, notwithstanding the dismissal of Plaintiff's claims.

While Plaintiff has filed a motion for class certification, the Court observes that Plaintiff is the sole proposed representative of the proposed class. The Court having concluded that Plaintiff has not stated a claim under the Truth-in-Lending Act upon which relief may be granted, Plaintiff is not an adequate representative of any class of persons who might assert such a claim against Defendant in the context of payment holiday loan extensions. Accordingly, the class, as proposed with Plaintiff as the class representative, may not be certified. In the absence of another proposed representative, this action must be dismissed in toto.

4. Conclusion

For the foregoing reasons, Defendant's motion to dismiss (Doc. 3) is hereby **GRANTED**. Plaintiff's Truth-in-Lending Act claim is **DISMISSED WITH PREJUDICE**. Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE** to their assertion in a court of competent jurisdiction. Plaintiff's motion for class certification (Doc. 9)

is hereby **DENIED**. This action is **DISMISSED** in its entirety.

IT IS SO ORDERED.

/s/_____
Sandra S. Beckwith
United States District Judge

APPENDIX D

15 U.S.C. § 1602.
Definitions and rules of construction

(a) The definition and rules of construction set forth in this section are applicable for the purpose of this subchapter.

* * * *

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

* * * *

(h) The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

APPENDIX E

§ 1638. Transactions other than under open end credit plan

(a) For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

* * * *

(3) The "finance charge", not itemized, using that term.

* * * *

(b)(1) Except as otherwise provided in this part, the disclosures required under # subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.